

Reply Comments of Peoples Telephone Company
July 15, 1996

will put in place a solid, rational compensation mechanism pending establishment of the Commission's final regulations under Section 276.

A flat rate interim surrogate for subscriber 800 calls is particularly appropriate because carriers, like AT&T,¹² have stated that it will take time to implement per call tracking mechanisms for interstate subscriber 800 calls. Ordering a monthly, flat-rate per payphone based on call volumes submitted by APCC (average of 100 monthly 800 subscriber calls)¹³ and Peoples (average of 86 monthly 800 subscriber calls) is reasonable under the circumstances.¹⁴ In addition, because a typical Peoples payphone now completes on average 43 access code calls per month, the monthly carrier access code rate of \$6.00 per month, which was based on an average of 15 carrier access code calls per month, should be based on current call volumes and rate levels as well.

Consistent with this adjustment, the per call rate paid by AT&T and Sprint should be increased from \$0.25 to \$0.45 per call, in light of the actual costs and current cost surrogates incurred to originate these calls.¹⁵ This is consistent with the statutory mandate and

¹² AT&T at 6.

¹³ APCC at 6.

¹⁴ The Commission could use a rate of at least \$0.40 that the Commission determined five years ago to compensate PSPs adequately for carrier access code calls, and which was ratified by APCC in its comments in this proceeding. APCC at 38.

¹⁵ Although APCC previously accepted AT&T's and Sprint's requests for a \$0.25 per call rate for carrier access code compensation, this acceptance was given at a time when it was vital simply to move forward to a per-call compensation system and away from a flat-rate, per payphone system. APCC was clear then that the \$0.25 per call rate was too low and in light of the increases in call volumes since then, the rate deficiency has only worsened.

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the financial realities dictating that PSPs receive fair compensation for each and every completed call that originates from their payphones

As a practical matter, the Commission can issue a simple accounting notice informing carriers that they will have to pay interim compensation from the date of the *Notice*, although the actual first payment of the compensation may occur after the adoption of the Commission's rules in this proceeding -- as was the case when the Commission ordered the original monthly \$6.00 per payphone carrier access compensation amount.

Finally, interim compensation is legal. Indeed, both case law and "the law of the case" support interim compensation, effective as of the release date of the *Notice*. The Commission under its Section 4(i) authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions," has ample legal basis to order interim compensation from the *Notice* date. Although the RBOC Coalition correctly observed that retroactive rate adjustments are unlawful,¹⁶ there is an important and clear distinction between "retroactive" rate adjustments and "interim" rates, as are being contemplated here. A retroactive rate adjustment would impose a rate increase on calls made prior to issuance of any order or notice, and is rightfully prohibited by the "filed rate doctrine," which provides that only rates on file can be given effect and allows parties to make business decisions on the assumption that the rates they pay will not be retroactively increased.¹⁷ Notwithstanding this distinction, the

¹⁶ RBOC Coalition at 20 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n.8 (1981); *Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Ry.*, 284 U.S. 370, 390 (1932); *TRT Telecommunications Corp. v. FCC*, 857 F.2d 1535, 1547 (D.C. Cir. 1988).

¹⁷ See *TRT Telecommunications Corp.*, 857 F.2d at 1547.

filed rate doctrine is inapplicable here because: (1) the compensation rates are not "tariffs," and (2) the \$0.40 per call rate already is in place, the Commission only needs to apply the rate to new call volumes and call categories that should have been included in the first instance.

An "interim" compensation rate, on the other hand, is a forward-looking device. It would not affect calls for which the parties involved have already accounted prior to the issuance of the *Notice*, but rather would implement rates that will be charged on a prospective basis. The Commission has the authority to order interim measures, as noted in *United States v. Southwestern Cable Co.*,¹⁸ in which the Supreme Court found the Commission had the authority to take interim measures in the regulation of community antenna television systems. Relying on the broad authority granted under section 4(i), the Court explicitly held that orders granting interim relief "do not exceed the Commission's authority."¹⁹

In addition, the D.C. Circuit has on numerous occasions upheld interim measures ordered by the Commission. For example, in *MCI Telecommunications Corp. v. FCC*,²⁰ the D.C. Circuit upheld the Commission's interim measures for regulating customer premises equipment (CPE), holding that the FCC had engaged in "reasoned decisionmaking" and therefore its decision was well within its discretionary powers and subject to deference from the

¹⁸ 392 U.S. 157 (1968).

¹⁹ *Id.* at 180

²⁰ 750 F.2d 135 (D.C. Cir. 1984).

courts. The court noted: "Since the FCC could deregulate all CPE today, it is unreasonable to preclude the agency from avoiding hardships by denying it the power to phase-out regulations."²¹

That the Commission has the power to order immediate, interim updates to the existing compensation plan as evidenced by *Florida Payphone* and its authority under Section 4(i) cannot fairly be disputed. The Commission has already developed a substantial record in the *Notice* on which to base an order for interim compensation here. As a result, interim compensation, as described above, is properly and legally ordered from the date of the *Notice* (June 6, 1996). Those seeking a continued "free-ride" or a competitive advantage, cannot be permitted to carry the day on this issue -- a per call rate of \$0.40 is already established, the Commission only needs to update certain call volumes and the scope of compensable calls as mandated by *Florida Payphone*.

III. THE RECORD SUPPORTS ADOPTION OF A UNIFORM PER-CALL COMPENSATION MECHANISM FOR EACH AND EVERY COMPLETED INTRASTATE AND INTERSTATE CALL ORIGINATED FROM PAYPHONES.

There was a broad consensus among the commenting parties supporting the fundamental principal that all PSPs should receive "fair" compensation for "each and every completed intrastate and interstate call using their payphone."²² The parties, however, differed as to the exact amount of the compensation and the calls entitled to compensation. At the low end, the IXC's suggested a rate of \$0.0675 per call,²³ and at the high end, the RBOCs

²¹ *Id.* at 142. See also *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996); *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988); *MCI Telecommunications Corp. v. FCC*, 712 F.2d 517 (D.C. Cir. 1983).

²² 47 U.S.C. § 276(b)(1)(A)

²³ Sprint at 23

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of the)

Pay Telephone Reclassification and)

Compensation Provisions of the)

Telecommunications Act of 1996)

CC Docket No. 96-128

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Federal Communications Commission
Office of Secretary

COMMENTS

BellSouth Corporation, on behalf of its affiliated companies ("BellSouth"), hereby files its comments to the Notice of Proposed Rulemaking released on June 6, 1996.¹

INTRODUCTION

BellSouth is a member of the RBOC Payphone Coalition which has submitted Comments in this proceeding addressing the major issues set forth in the NPRM. BellSouth files these separate comments to emphasize that in enacting the pay telephone provisions of the Telecommunications Act of 1996² Congress intended that the industry be deregulated and that there should be immediate regulatory parity for all pay telephone providers.

¹ In the Matter of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Notice of Proposed Rulemaking, FCC 96-254 (rel. Jun. 6, 1996) (hereinafter "NPRM"). By subsequent Order, the Commission modified the comment and reply comment dates. See Order DA 96-983 (rel. Jun. 20, 1996).

² Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 276) (hereinafter "1996 Act").

transitional rates set in this manner are inconsistent with the Commission's regulations and thus preempted. Finally, the regulations should embody the standards which the Commission should use to adjudicate any complaints or petitions brought by a PSP that are grounded in Section 276's express preemption clause. When a petition is brought concerning a rate which is set after existing rates based on terminated subsidies are preempted and transitional rates expire, a state shall have the burden to overcome the presumption that its rate, as non-market based, is *prima facie* inconsistent with the Commission's regulations.

The standards the Commission ultimately adopts to review such expedited petitions should ensure that any state prescribed rate covers costs plus fair compensation for the PSP. In making this determination, the Commission should not combine revenues from different call streams; such an analysis is inconsistent with Congress's mandate that PSPs be fairly compensated for "each and every call" and requires extensive regulatory scrutiny. The Commission should also determine that a reduction in the number of general payphones caused by such rate is not primarily a local matter, but contrary to Congress's general purpose to "promote the widespread deployment of payphone services to the general public." The Commission should resolve such petitions in 120 days.

II. PSPs SHOULD RECEIVE INTERIM PER-CALL COMPENSATION

The Commission seeks comment on whether it should provide private payphone owners ("PPOs") some measure of interim compensation, to be paid until the effective date of the final rules adopted in this proceeding, for the growing volume of dial-around calls originated from their payphones. BellSouth believes that the benefits to the public from full market parity in the payphone industry will only be achieved when all PSPs have the ability to participate in the

selection of the interLATA and intraLATA carriers who serve their payphones, and when all PSPs have the ability to be compensated for the use of their payphones.

In light of this, BellSouth strongly supports interim per call compensation, effective immediately. The Commission can build upon its existing per call compensation plans, or adopt a flat-rate, monthly amount based on an average number of calls per payphone set at a flat per call rate. In the event that the Commission allows the current effective date of its Order detariffing inmate only payphones to remain in effect,¹³ then RBOC PSPs should also receive, beginning on the effective date of that Order, the same interim compensation for calls made on their inmate only payphones as PPOs are granted.

III. GRANTING BOC PSPs THE SAME RIGHTS TO NEGOTIATE WITH LOCATION PROVIDERS ON THE SELECTION OF THE PRESUBSCRIBED INTERLATA CARRIER AS INDEPENDENT PSPs WILL FOSTER INCREASED COMPETITION AND REGULATORY PARITY

True regulatory parity must mean that all PSPs, BOC and non-BOC alike, have the freedom to negotiate with or on behalf of location providers to aggregate traffic from payphone stations, to shop this traffic on the open market to interexchange carriers in return for a freely negotiated commission, to receive the per-call compensation required under Section 271 for each and every intrastate and interstate call using a payphone, and to resell telephone toll service as an operator service provider ("OSP"), subject to all applicable laws, including branding requirements under TOCSIA. Of course, both independent and BOC PSPs will be subject to the ultimate authority of the location provider to pick the carrier of choice, as the legislative history makes

¹³ In the Matter of Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, Declaratory Ruling, RM-8181, FCC 96-34 (rel. Feb. 20, 1996) 2 Comm. Reg. (P&F) 476 (petitions for waiver and for partial consideration or stay pending)

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WASHINGTON, D.C.**

In the Matter of

Implementation of the Pay Telephone)
Reclassification and Compensation) CC Docket No. 96-128
Provisions of the)
Telecommunications Act of 1996)

**COMMENTS OF THE
RBOC PAYPHONE COALITION**

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into consideration, while other methods of measuring compensation (like a flat per-call rate) do not.

Consequently, the Commission should require carriers to enhance their tracking systems to measure call duration ("minutes of use") and require a shift to duration-sensitive compensation as soon as it is technologically feasible to do so. At the very least, the Commission should not preclude negotiated per call compensation arrangements that turn on the duration of the call. Indeed, such arrangements exist today, for example, where commissions on 0+ calls are negotiated and paid on the basis of a percentage of the value of each call (which is a function of distance, time of day, and duration).¹⁹

5. The Commission Should Not Provide Independent PSPs with Interim Compensation to be Paid Pending the Effective Date of the Final Rules.

The Commission seeks comments on whether it should provide independent PSPs some sort of interim compensation to be paid until the effective date of the final rules adopted in this proceeding. NPRM ¶ 39. The Coalition believes that such interim compensation would be unwise, unadministrable, and illegal. Such compensation would constitute a windfall to one particular group of industry players and therefore would unbalance the playing field. That would be contrary to the statutory requirement that the Commission "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). The statute makes no provision for some subset of PSPs to get interim compensation; indeed, it makes

¹⁹AT&T had to seek a waiver of the Commission's rules in order to provide per-call compensation to non-RBOC PSPs. Even if the Commission establishes a flat rate per call, the Commission should permit negotiated compensation based on minutes of use without the need for any waivers.

no provision at all for interim compensation. The statute simply directs the Commission to establish rules for the industry as a whole within nine months.

Given the shortness of the time in question, an interim compensation plan would also cause administrative problems for the carriers who would have to implement it. They will be busy enough establishing the tracking and administrative mechanisms required by the Commission's final rules, without at the same time trying to implement a different, interim scheme. Finally, the Commission certainly has no legal basis for making any interim compensation retroactively effective as of the release date of the NPRM. See NPRM ¶ 40. It is well-established that retroactive rate adjustments are unlawful. See, e.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578 n.8 (1981); Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Ry., 284 U.S. 370, 390 (1932); TRT Telecommunications Corp. v. FCC, 857 F.2d 1535, 1547 (D.C. Cir. 1988).

E. Per-Call Compensation on Local Coin Calls. [NPRM ¶¶ 21-23]

The Coalition believes that the market, not regulation, should determine the local coin rate.²⁰ Indeed, as noted earlier, the Commission has itself recognized that prices set by a competitive market benefit the general public and are by definition fair prices. See p. 9, supra. Just as the Coalition advocates market-based pricing on other per-call compensation amounts, it sees no reason to depart from that approach when establishing the local coin rate.

There can be little dispute that the coin payphone market is already structured to operate competitively but for the existence of regulatory constraints. Because there are few, if any, barriers to entry and many experienced market players, no one market participant can charge

²⁰For reasons stated in separate comments, Bell Atlantic does not believe that Congress intended to give the Commission authority over rates for local coin services. However, should the FCC determine that it does, indeed, have such jurisdiction, Bell Atlantic endorses the approach discussed below.

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The Notice (§ 39) also seeks comment on whether the Commission should devise "some measure of interim compensation" for competitive payphone providers. AT&T would support a requirement that all carriers pay interim per-call dial-around compensation on the same basis as AT&T and Sprint do under their existing waivers.²¹ Such a requirement is clear and unambiguous and would place all IXC's on a par until the Commission issues final rules in this proceeding.²² There is no basis in the record, however, to require interim compensation for other types of calls, especially 800 subscriber calls, including debit card calls. There is no known reliable tracking mechanism for such calls (see Part C below), and there is no basis to establish a compensation amount until the Commission's TSLRIC analyses are completed. Thus, there is no record upon which the Commission could order interim compensation for such calls. Moreover, the practical difficulties of establishing an interim system -- which would only operate for a short time -- make establishment of such a system infeasible.

²¹ Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Memorandum Opinion and Order, 10 FCC Rcd 1590 (1994); id., Memorandum Opinion and Order, 10 FCC Rcd 5490 (1995).

²² At a minimum, the Commission should require at least MCI and LDDS/Worldcom to move to per-call compensation immediately on the same terms as AT&T and Sprint. A request for such relief has long been pending in the Petition of the American Public Communications Council in Docket No. 91-35 and an order requiring parity among the largest carriers would be appropriate while the Commission determines its final rules here.

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In the Matter of)	
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Act of 1996)	

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July 1, 1996

The Commission also seeks comment, in ¶39, on whether it should provide PPOs some measure of interim compensation to be paid until final rules in this proceeding take effect. Sprint is skeptical that such a compensation system could be put in place by the industry prior to the effective date of rules establishing a permanent compensation plan. Moreover, there is no clear showing of need by the PPOs for such compensation. Since, as the analysis above would indicate, the 25¢ per call rate PPOs are receiving from AT&T and Sprint fully compensates them for other calls not currently compensable, and the per-call charge implicit in the per-line charge they receive from other IXC's is even greater, there is no reason to believe they are entitled to any additional compensation at this time.

B. RECLASSIFICATION OF INCUMBENT LEC-OWNED PAYPHONES

2. Discussion

a. Classification of LEC Payphones as CPE

Sprint agrees with the Commission's tentative conclusion (¶44) that LEC payphones should be classified as CPE for Computer II regulatory purposes but that structural separation should not be required. Sprint also agrees that LECs should be required to offer central office coin transmission services to PSPs under a non-discriminatory, public, tariffed offering (¶45) and that such an offering should be treated as a "new service" for purposes of price cap rules (see ¶46). Sprint

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REPLY COMMENTS

MCI Telecommunications Corporation (MCI) hereby responds to the comments filed concerning the Commission's proposed rules implementing the payphone provision of the Telecommunications Act of 1996 (the Act).

I. COMPENSATION MUST BE COST-BASED [¶14-23 and ¶ 35-40]

The comments filed support the Commission's tentative conclusions that compensation should be cost-based and that there is no need to prescribe compensation for 0+ calls to the presubscribed carrier because payphone service providers (PSPs) have the ability to receive "fair" compensation through commission payments. The same rationale makes Commission-prescribed compensation unnecessary for any calls made to the presubscribed carrier. Commission-prescribed compensation also is unnecessary for inmate payphones and semi-public payphones, the former because they are provided pursuant to contract (and, therefore, the PSP can require "fair" compensation as a condition to providing its payphones) and, in the latter, because the premise owner pays. In addition, as MCI's comments demonstrate, the Commission should not prescribe compensation for

that do arise, the parties will have the information needed to address and resolve them. Thus, the costly and burdensome reporting and auditing mechanisms proposed by the Commission to deal with such disputes should not be necessary.

IV. INTERIM COMPENSATION [¶ 39]

The majority of commenters agrees that interim compensation should not be required before the Commission adopts final rules in this proceeding. Given the time frame within which this proceeding must be concluded, it is unlikely that any interim compensation mechanism could even be implemented. Also, the cost of implementing an interim mechanism for so short a period of time would not be justified.

The comments demonstrate that there is no need for interim compensation. The PSPs advance primarily two arguments in support of interim compensation: first, they contend that the number of access code calls is increasing and they are not receiving compensation for them; and, second, they argue that they are providing service for these uncompensated calls at a loss, thereby affecting the profitability of their business. The record evidence, however, refutes both of these claims. As an initial matter, it is well established that most payphone costs are fixed; that is, they are not traffic-sensitive. Therefore, an increase in the number of calls from a payphone does not increase the payphone provider's cost. Moreover, as demonstrated herein, payphone providers receive over \$3,300 a year in coin and

non-coin revenues, which greatly exceed the cost of providing a payphone. Finally, the success of private payphone providers refutes their contentions since it is unlikely that they could have supported the increase in the number of phones that were placed into service over the past decade, if they were operating at a loss.

V. ASSET TRANSFERS [¶ 41-49 and ¶ 50-54]

The RBOC Coalition states that all asset transfers should be completed and all payphone costs should be removed from rates within 12 months of the effective date of the regulations to be adopted. With respect to intrastate subsidies, the RBOC Coalition and USTA argue that the states should be allowed to formulate their own mechanisms for removing intrastate subsidies. Although MCI does not object to this position, the Commission nevertheless should make clear that LECs are not entitled to any payphone compensation until all payphone costs are removed from interstate and intrastate rates. In addition, the Commission should establish a date certain by which these costs must be removed.

VI. RBOC SELECTION OF THE INTERLATA PIC [¶ 67-72]

The comments support MCI's position that, until the RBOCs face significant competition in the local exchange market, they will be able to subsidize commission payments to premise owners with regulated service revenues and thus, behave anti-